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January 27, 2012

Council on Environmental Quality
ATTN: Horst Greczmiel
Associate Director for NEPA Oversight
722 Jackson Place NW
Washington, D.C. 20503

Re: "Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act"

Dear Mr. Greczmiel,

The Northwest Mining Association (NWMA) appreciates the opportunity to comment on the draft Council on Environmental Quality (CEQ) guidance entitled, *"Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act."* This guidance highlights the tools available under the National Environmental Policy Act (NEPA) for the efficient and timely conduct of environmental reviews.

In addition to the underutilized tools highlighted in the draft guidance, we outline below our recommendations for the efficient and timely preparation of NEPA documents that may be helpful to CEQ in formulating the final guidance.

MEMBER INTERESTS AFFECTED

NWMA is a 117 year old, 2,000 member, non-profit, non-partisan trade association based in Spokane, Washington. NWMA members reside in 42 states and are actively involved in exploration and mining operations on public and private lands, especially in the West. Our diverse membership includes every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. NWMA's broad membership represents a true cross-section of the American mining community from small miners and exploration geologists to both junior and large mining companies. More than 90% of our members are small businesses or work for small businesses. Most of our members are individual citizens.

Since the enactment of NEPA in 1970, it has guided the activities of many of our members in conducting mineral exploration and mining activities. Our members have extensive first-hand experience with NEPA and the permitting process, and are significantly impacted by decisions that are the direct result of NEPA and how it is implemented. Thus, we are significant stakeholders when it comes to completing timely NEPA reviews.

EXECUTIVE SUMMARY

NEPA IS PROCEDURAL

As one of the first environmental laws in this country, NEPA was landmark legislation, signaling the dawning of environmental awareness and the first step down the path of enacting what has become a comprehensive and effective federal and state statutory framework to protect the environment. NEPA is a procedural law that creates a *process* to seek public comments, consider alternatives, and disclose impacts. It does not include any substantive, on-the-ground environmental protection requirements or standards (emphasis added). These environmental protection authorities are derived from the many other environmental laws passed since the enactment of NEPA.

While a NEPA analysis has become "standard operating procedure" for our members it has also become much more cumbersome, time consuming and expensive. Something is dreadfully wrong with a process designed to provide a "hard look" at the impacts of major federal actions affecting the human environment, that now takes five, ten and even eighteen years to complete. What NEPA sponsor, Senator Henry Jackson (D-WA), thought would be a 6-8 page document, the Environmental Impact Statement (EIS) has, with respect to most mining projects, mushroomed to thousands and thousands of pages. Senator Jackson never intended for federal agencies and federally-permitted projects to write an encyclopedic EIS. No one anticipated that everyone would sue and challenge the environmental analysis. No one anticipated anti-development groups would be using NEPA as a delaying tactic.

NWMA wants to emphasize that substantive U.S. environmental laws and regulations are not the problem -- it is the process of obtaining agency permits and approvals. Our members take great pride in protecting the environment while producing the minerals America needs. The U.S. mining industry is the most environmentally responsible mining industry in the world. Mining and environmental protection are compatible, and mineral products make possible both the development of our society and the mitigation of modern society's impact on the environment.

It is imperative that the NEPA process be reviewed and reformed to remove inappropriate barriers to domestic mineral activity without sacrificing environmental protection. NWMA believes reforming the NEPA process and streamlining the permitting system are critical to improving the competitiveness of the domestic mining industry and job creation. This point recently was emphasized by Tom Albanese, CEO of NWMA member company Rio Tinto, who stated, " I would like to import jobs to America, but we have constraints in terms of permits, environmental lawsuits, the 'not in my backyard' movement, and it makes it hard."

NEPA is no longer the planning and decision-making tool it was designed to be. Instead, it has become **THE TOOL** used by obstructionist groups who oppose responsible and lawful mineral development on federal public lands.

NWMA recommendations for NEPA reform include:

1. Reaffirm the procedural intent of NEPA.

CEQ (and Congress) should reaffirm the procedural intent of NEPA by providing that the purpose of NEPA is procedural only and that NEPA cannot be used to condition, delay or deny a project that complies with all substantive environmental laws and regulations. In other words, if a mining proposal met the requirements of the Clean Water Act, the Clean Air Act, the Endangered Species Act, etc., NEPA could not be used to add conditions or requirements, or require additional mitigation that is not specifically mandated by a substantive environmental law or regulation.

2. NEPA should be re-evaluated in the context of environmental laws.

CEQ should evaluate how NEPA interacts with the plethora of environmental laws and regulations enacted since NEPA, with a focus on minimizing the duplication in the evaluative processes of NEPA and those environmental laws.

3. Bring accountability to the permitting process.

Issues and concerns raised by local interests should be accorded higher standing than comments from outside groups and individuals who are not directly affected by a proposed project or land use decision. In addition, NEPA appellants should be required to post bonds to cover the government's and the private-sector's costs due to delays and legal fees if the agency's NEPA decision is sustained.

4. Require Land Management Agencies to demonstrate that their regulations, policies and decisions comply with the Mining and Minerals Policy Act of 1970, the Federal Land Policy and Management Act of 1976, the Domestic Minerals Program Extension Act of 1953 and Executive Order 13211.

All NEPA decisions should be required to analyze impacts to domestic mineral and energy resource development and require that NEPA decisions evaluate compliance with the above laws and policies.

5. Agencies should be granted the authority to disregard public comments that attempt to change land management status in project-specific NEPA documents.

NEPA public comment scoping notices should specify the range of decision options authorized by statute and land use plans, and establish that project-specific NEPA documents cannot be used to change existing law or to challenge previously authorized land use plans. Interest groups seeking to oppose natural resource development on public lands already have an opportunity to express their viewpoint in NEPA documents that agencies prepare for their land use plans. Agencies should thus be granted the authority to disregard public comments that attempt to change land management status in project-specific NEPA documents.

6. NEPA alternatives analysis needs to recognize the fixed location of mineral deposits and other natural resources due to geologic constraints.

The CEQ regulations that implement NEPA create specific problems for proposed mineral projects. The requirement to analyze alternatives to the Proposed Action is not well suited for

many mineral projects because geologic factors must dictate where mineral exploration and development occurs.

7. Use of programmatic NEPA documents saves time and resources.

Federal land management agencies currently devote enormous time and energy preparing individual NEPA documents, typically Environmental Assessments (EAs), for exploration drilling projects. A more efficient and cost effective approach would be to prepare a programmatic document that analyzes the environmental impacts and appropriate mitigation measures for a typical exploration drilling project that employs a predetermined set of Best Management Practices. This document could then be used as the basis for evaluating individual exploration drilling project proposals.

Projects that fit within the parameters of the programmatic document and that adopt the recommended Best Management Practices and mitigation measures recommended in the programmatic document could then be approved with either a Categorical Exclusion or a Determination of NEPA Adequacy (DNA) checklist.

8. Implement the reform recommendations of the National Mining Association's white paper entitled *The National Environmental Policy Act Impact on Public Lands Mineral Development and Options for Reform.*

This report was prepared by NWMA member David Delcour for the National Mining Association and is based on interviews with 20 mining industry employees who have extensive experience with NEPA, 6 public land managers who had recent experience with mining projects subject to NEPA and 4 representatives of two other public land user groups, timber and oil and gas. Although this report was prepared in 1997, its findings and recommendations are equally valid today. If anything, the problems cited in this report have increased, permitting times are longer and frustration with the NEPA process is at an all time high.

9. Implement the findings and recommendations of the National Academy of Science contained in its 1999 report to Congress entitled *Hardrock Mining on Federal Lands.*

In 1998, Congress authorized and mandated the National Academy of Sciences to identify and consider, among other things, recommendations and conclusions regarding how federal and state environmental, reclamation and permitting requirements and programs can be coordinated to ensure environmental protection, increase efficiency, avoid duplication and delay, and identify the most cost-effective manner for implementation. Several of those recommendations focused specifically on improving the NEPA process and streamlining the U.S. permitting system.

10. Prevent redundant or duplicative NEPA analysis.

One of the many problems with NEPA is redundant or duplicative analysis. One way to address this problem is to provide that agency permitting processes that are the "functional equivalent" of a NEPA analysis satisfies the requirements of the law. The environmental performance and reclamation standards embedded in the Federal Land Management and Policy Act, the Forest Service Organic Act, and their corresponding regulations, supplemented by additional permit requirements under the Clean Air Act (CAA), Clean Water Act (CWA), Endangered Species

Act, and Safe Drinking Water Act, provide the functional equivalent of a NEPA review for proposed exploration and mining operations on federal land. Altogether, these laws ensure the full and thorough consideration, both substantively and procedurally, of environmental impacts from mining operations on federal lands regardless of the NEPA process.

11. CEQ should prepare regulations that allow existing state environmental review process to satisfy NEPA requirements.

NWMA supports the "functional equivalents" concept. If a state has a state environmental policy act or an environmental review/permitting process similar to NEPA, then NEPA regulations should allow that process to satisfy similar NEPA requirements. This will result in a more efficient, streamlined less costly process. In many cases today, state and federal agencies enter into Memorandums of Understanding (MOU) to allow one agency to be the lead agency. NWMA supports codification to bring consistency and cost effectiveness to the process.

12. Define "major federal action."

At the current time there is a significant difference of opinion between the various federal agencies and, in fact, between different offices within the same agency, as to what constitutes a major federal action. Some confuse "major federal action" with "major federal impacts" or major impacts to the environment. The size of the impact is not determinative as to what constitutes a "major federal action." By establishing clear and concise criteria for what constitutes a major federal action, the process of evaluating environmental impacts and developing mitigation criteria will be improved and streamlined.

13. Add Mandatory Timelines for the Completion of NEPA Documents.

NWMA strongly recommends mandatory timeframes of 18 months for completion of an EIS and 9 months for completion of an EA. Also, a specific time limit of no more than 60 days for completing the Categorical Exclusion process should be included. Allowances for one extension of those timeframes, of no more than 6 months for an EIS and 3 months for an EA, could be considered but only under the most unusual of circumstances. These timeframes should begin when the applicant has given the agency sufficient information to complete the NEPA process. If governmental agencies fail to comply with these statutory timeframes, then the NEPA review process should be deemed completed with an affirmative Record of Decision.

14. Allow applicant to prepare Environmental Impact Statements.

Applicants should be allowed to prepare EIS's, subject to independent review by the agency. This is currently the case with Environmental Assessments.

15. EPA's role in the NEPA process needs to be re-evaluated and even eliminated - especially in states with Clean Water Act and Clean Air Act primacy.

In some cases, EPA appears to be offering comments in an attempt to expand its regulatory authority over projects, having lost sight of the fact that NEPA is a disclosure and decision-making process and not a permitting process. Because NEPA is not a permitting process, EPA should not be allowed to use it as such.

In other cases, it seems as if EPA is simply trying to obstruct projects. Regardless of whether the agency is seeking to expand its authority or to obstruct projects, both objectives are unacceptable.

NEPA IS BROKEN

Since enactment, our members have seen material changes in the application and interpretation of NEPA and associated regulations, and at the same time it has become increasingly inconsistent in its implementation. While a NEPA analysis has become "standard operating procedure" for our members it has also become much more cumbersome, time consuming and expensive.

The CEQ draft guidance does not suggest new approaches for making the reviews more efficient, but rather highlights existing tools that are underutilized by federal agencies. In particular, the draft guidance encourages agencies to:

- Prepare concise and timely reviews, focused on significant issues;
- Integrate NEPA into project planning;
- Adopt and incorporate by reference existing documents and studies;
- Collaborate with other agencies so that environmental reviews can run concurrently rather than consecutively;
- Conduct early and well-defined scoping, focused on significant issues;
- Develop meaningful and expeditious timelines for environmental reviews; and
- Respond to comments in proportion to the scope and scale of the environmental issues raised.

The draft guidance emphasizes the benefits of establishing clear timelines on a project-by-project basis, which may help provide some measure of predictability to the process.

While it may be helpful through this draft guidance to emphasize the need and avenues for timely and efficient NEPA review, we believe NEPA is badly broken and in need of serious repair. The NEPA process is being misused in ways that delay a whole array of desirable projects that create jobs and decrease our reliance on foreign sources of energy and minerals.

Ultimately, the only way to really "fix" NEPA is through legislation, which needs to: 1) limit the scope of legal challenges to agency action under NEPA; 2) impose financial costs on unsuccessful litigants; 3) set project review timelines with real consequences; 4) have NEPA defer analysis to established "media specific" regulatory programs that are required for a project; and 5) for industry proposed projects that are federal actions under NEPA, limit the alternative review process and use mitigation as the only mechanism to lessen the environmental impacts of the project.

Barring a legislative fix, CEQ should go beyond mere guidance and reform their regulations regarding agency NEPA practices to include quantitative measures implementing the principles in the draft guidance.

The costs, time delays and unpredictability of the NEPA process significantly impact our members, especially small and medium sized companies that undertake high risk grassroots exploration and early stage mineral development. They are an important part of the mining industry's food chain and provide the feed stock that will be tomorrow's producing mines operated by larger companies.

Something is dreadfully wrong with a process designed to provide a "hard look" at the impacts of major federal actions affecting the human environment, that now takes five, ten and even eighteen years to complete. What NEPA sponsor, Senator Henry Jackson (D-WA), thought would be a 6-8 page document, the Environmental Impact Statement (EIS) has, with respect to most mining projects, mushroomed to thousands and thousands of pages. Senator Jackson never intended for federal agencies and federally-permitted projects to write an encyclopedic EIS. No one anticipated that everyone would sue and challenge the environmental analysis. No one anticipated anti-development groups would be using NEPA as a delaying tactic.

CURRENT NEPA PROCESS INCREASES U.S. RELIANCE ON FOREIGN MINERALS

The public lands provide a major source of domestic mineral production. Mining on federal lands provides the Nation's highest paid non-supervisory wage jobs. These jobs are one of the cornerstones of western rural economies and are the foundation for the creation of much non-mining service and support business found in or near federal lands in the West. Mining is the cornerstone of sustainable development in many western rural communities.

Mining on federal lands also provides substantial local and state tax revenues for infrastructure and services, as well as federal tax revenues. Mineral development also creates new wealth, which is distributed throughout the U.S. economy and society. Thousands of manufacturing and service jobs throughout the Midwest and Eastern parts of the U.S. are directly dependent on a strong U.S. mining industry. These economic and social benefits are dependent upon the U.S. mining industry's ability to attract investment capital in an intensely competitive global mining market.

According to a report by Behre Dolbear entitled 2011 Ranking of Countries for Mining Investment -- Where "*Not to Invest,"* the U.S. ranks dead last in terms of permitting time among the top 25 mining countries in the world. Consequently, the U.S. is seeing fewer investment dollars for new projects, leading to an increased reliance on foreign imports. To illustrate this point, the Metals Economics Group (MEG) produces an annual report entitled "World Exploration Trends" which tracks global exploration and industry trends. The 2011 MEG report estimates that nonferrous exploration budgets for 2010 will total $12.1 billion. Yet, despite significant mineral resources, the U.S. attracts only 8% of total world-wide exploration dollars, in large part due to excessively long permitting timeframes, down from 20% in the late 1990's.

The U.S. has become increasingly vulnerable and dependant on foreign sources of strategic and critical minerals and this vulnerability has serious national defense and economic consequences. According to the USGS, the U.S. is more than 50% import reliant for 43 critical minerals and 100% import reliant for 19 critical and strategic minerals despite being the third largest source of mineral wealth in the world.

This increased dependency on imports is not in the national interest. Import dependency holds a multitude of negative connotations including aggravation of the U.S. balance of payments, unpredictable price fluctuations and vulnerability to possible supply disruptions from political or military activity. It is irresponsible to ignore the vast mineral resources we have within our nation's boundaries. Given the current state of the world, the potential for supply disruptions may be on the rise.

Therefore, it is imperative that the NEPA process be reviewed and reformed to remove inappropriate barriers to domestic mineral activity without sacrificing environmental protection. NWMA believes that reforming the NEPA process and streamlining the permitting system are critical to improving the competitiveness of the domestic mining industry.

Unfortunately, the sad truth is that the United States is considered a high risk, unpredictable country by the investment markets that supply the capital to fund exploration and development. The NEPA process, together with the U.S. permitting system, restricted access to mineral deposits and the inability to secure land tenure has made mineral development and production difficult, time consuming, costly and in some cases, impossible. This point recently was emphasized by Tom Albanese, CEO of NWMA member company Rio Tinto, who stated, " I would like to import jobs to America, but we have constraints in terms of permits, environmental lawsuits, the 'not in my backyard' movement, and it makes it hard."

The mining industry is not alone in the view that delays in the permitting process are a significant problem. For example, the National Research Council of the National Academy of Sciences (NRC) has concluded:

> The permitting process is cumbersome, complex, and unpredictable because it requires cooperation among many stakeholders and compliance with dozens of regulations for a single mine. As a result, there is a tendency for the process to drag on for years, even a decade or more. This drains and diverts the resources of land management agencies that should be managing their full range of responsibilities. It is also burdensome to operators and does not provide the best environmental protection. The public, the land management agencies, and the permit applicants would all benefit if the permitting process were conducted more efficiently. *Hardrock Mining on Federal Lands* ("NRC Report") pp.122-123.

The capital markets are saying no to mineral investment on federal public lands in the U.S., or charging a premium and/or exacting repayment terms that are not required for projects on state or private land. This lack of access to capital makes it difficult and expensive for small and medium sized companies (small businesses) to operate on public lands. The time delays involved in permitting a mine in the United States tie up capital too long, resulting in unacceptably low rate of returns. Given the commodity price cycle of minerals, investors simply cannot risk investing money in projects when prices are increasing, only to have the project delayed, prices fall, and the project become uneconomical.

The current NEPA process makes it very difficult for federal decision-makers to disregard comments that lack technical or factual foundation, resulting in unnecessary expenditures of public and private resources, numerous delays, protracted and contentious public debates over proposed mines, and enormous costs to the industry. Anti-mining obstructionist groups are able

to delay projects through appeals and litigation with little or no investment, no risk, and no accountability. Not only do these delays directly impact the mining companies trying to invest capital in wealth and job creating mineral development, they adversely impact western rural communities, national security and the economic future of the U.S. And, very few federal regulators are willing to make decisions for fear of being second guessed. The fear of litigation results in analysis/paralysis to the detriment of the industry, the economy and the environment.

NWMA wants to emphasize that substantive U.S. environmental laws and regulations are not the problem -- it is the process of obtaining agency permits and approvals. Our members take great pride in protecting the environment while producing the minerals America needs. The U.S. mining industry is the most environmentally responsible mining industry in the world. Mining and environmental protection are compatible, and mineral products make possible both the development of our society and the mitigation of modern society's impact on the environment.

Unfortunately, NEPA is no longer about protecting the environment. It is no longer the planning and decision-making tool it was designed to be. Instead, it has become **THE TOOL** used by obstructionist groups who oppose responsible and lawful mineral development on federal public lands.

RECOMMENDATIONS FOR IMPROVING THE NEPA PROCESS

Improving the competitiveness of America's mining industry begins with reforming the NEPA process and streamlining the U.S. permitting system. In addition to the obvious benefits to mining companies, an expedited and predictable permitting process creates substantial economic benefits for local and state governments and area merchants. With a faster permitting schedule, the jobs needed for project construction and operation become a reality sooner and on a fairly reliable schedule. These jobs create a revenue stream and increase the overall economic activity in the region near the mine. The workers pay taxes and buy goods and services in nearby communities.

Additionally, a predictable permitting schedule facilitates planning between community leaders, elected officials, and the project proponent to address fiscal and socio-economic impacts associated with a new or expanded workforce.

Following are specific NWMA recommendations for more efficient and timely NEPA reviews:

1. Reaffirm the procedural intent of NEPA

As one of the first environmental laws in this country, NEPA was landmark legislation, signaling the dawning of environmental awareness and the first step down the path of enacting what has become a comprehensive and effective statutory framework to protect the environment. As shown below in Table 1, since NEPA was enacted Congress has developed many other federal laws designed to protect all aspects of the Nation's environment.

Table 1 **Chronology of Enactment of Selected U.S. Environmental Laws**	
Enactment Date	**Federal Environmental Protection Statute**
1966	National Historic Preservation Act (NHPA)
1967	Air Quality Act
1969	**National Environmental Policy Act (NEPA)**
1970	Clean Air Act (CAA)
1972	Federal Water Pollution Control Act/Clean Water Act (CWA)
1973	Endangered Species Act (ESA)
1976	Federal Land Policy and Management Act (FLPMA) Resource Conservation and Recovery Act (RCRA) The Toxic Substances Control Act (TSCA)
1977	Surface Mining Control and Reclamation Act (SMCRA) Clean Water Act Amendments (CWAA)
1979	Archeological Resources Protection Act (ARPA)
1980	Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) also known as "Superfund"
1984	Hazardous and Solid Waste Amendments (HSWA)
1986	Superfund Amendments and Reauthorization Act (SARA)
1990	Clean Air Act Amendments (CAAA)

NEPA was designed to be a planning tool to make sure agency decision-makers and the public understood the environmental impacts of major federal actions, assessed compliance with state and federal environmental laws and regulations and mitigated the environmental impacts to ensure compliance with substantive environmental law. It never was intended to create new substantive environmental standards or rights that could stop a project that otherwise complied with all substantive state and federal environmental laws and regulations.

CEQ (and Congress) should reaffirm the procedural intent of NEPA by providing that the purpose of NEPA is procedural only and that NEPA cannot be used to condition, delay or deny a project that complies with all substantive environmental laws and regulations. In other words, if a mining proposal met the requirements of the Clean Water Act, the Clean Air Act, the Endangered Species Act, etc., NEPA could not be used to add conditions or requirements, or require additional mitigation that is not specifically mandated by a substantive environmental law or regulation.

2. <u>NEPA should be re-evaluated in the context of environmental laws.</u>

NEPA should be evaluated in the context of the many substantive environmental laws enacted since 1969 to:

- Evaluate whether NEPA and this body of environmental laws work well together;

- Determine if there is duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication; and

- Develop ways to integrate and optimize the NEPA analysis and impact disclosure process with the environmental permitting processes established in other laws.

In evaluating NEPA and its interaction with other federal environmental statutes, it is important to recognize the substantially different purposes between NEPA and other environmental laws. The acronym NEPA stands for "National Environmental *Policy* Act" – not the "National Environmental *Protection* Act." As such, NEPA is a process, a procedural law that requires federal decision makers to seek public comment, to consider alternatives, and to evaluate and disclose impacts.

In contrast, the environmental laws that post-date NEPA, like the Clean Air Act of 1970 and the Clean Water Act of 1972, protect specific environmental resources. Other post-NEPA environmental statutes deal with other aspects of environmental protection. For example, the Resource Conservation and Recovery Act of 1976 governs the management and disposal of solid and hazardous wastes. The Toxic Substances Control Act of 1976 deals with the manufacture, distribution, use, and disposal of toxic substances. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 pertains to releases of hazardous substances. These and the other laws shown in Table 2 provide substantive on-the-ground environmental protection mandates and compliance requirements.

Understanding the difference between NEPA and other environmental laws is critical to engaging in a constructive and meaningful dialogue about NEPA. Broader public awareness of this difference would greatly enhance the tenor of this discourse because NEPA must be evaluated in the context of the entire body of law to protect the environment. Since their enactment, the environmental laws that post-date NEPA have been enormously effective in improving the quality of our environment and will continue to provide comprehensive environmental protection for the future. Modifying the NEPA process will not change or compromise these substantive environmental laws. To the contrary, changing NEPA in ways that would allow federal decision-makers to get to a decision point sooner could actually improve environmental protection by expediting the approval process for proposed reclamation, cleanup, and other environmentally beneficial projects.

3. <u>Bring accountability to the permitting process.</u>

Anti-development groups have hijacked NEPA by turning it into a process of conflict and confrontation rather than an opportunity for communication and collaboration. These groups use NEPA as their 45-cent ticket to delay, oppose, and litigate natural resource development projects. As such, NEPA has become the anti-development groups' dream and the natural resource developers' nightmare.

Under the current NEPA process obstructionists can delay the mine permitting process for years through frivolous appeals and litigation with no risk and little investment. Meanwhile the project proponent and the community that depends on the jobs and economic contributions the mine will provide pay dearly. This litigious atmosphere severely clouds NEPA's strengths and purpose.

To bring fairness and accountability to the process, NWMA recommends changes in the NEPA public scoping and appeal processes. Issues and concerns raised by local interests should be accorded higher standing than comments from outside groups and individuals who are not

directly affected by a proposed project or land use decision. Giving local viewpoints more consideration in the NEPA process would ensure that the real economic and social impacts associated with a proposed action are properly evaluated, and that local and state concerns are adequately considered.

Additionally, NEPA appellants should be required to post bonds to cover the government's and the private-sector's costs due to delays and legal fees if the agency's NEPA decision is sustained.

4. Require Land Management Agencies to demonstrate that their regulations, policies and decisions comply with the Mining and Minerals Policy Act of 1970, the Federal Land Policy and Management Act of 1976, the Domestic Minerals Program Extension Act of 1953 and Executive Order 13211.

NWMA recommends that all NEPA decisions analyze impacts to domestic mineral and energy resource development and require that NEPA decisions evaluate compliance with the following:

- The Mining and Mineral Policy Act of 1970 (MMPA), 30 U.S.C. § 21(a), which mandates:

  > that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, and the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs.

  The MMPA has been on the books for more than 40 years, but the congressional policy set forth therein has been either ignored or treated with down-right hostility. CEQ should require, or in the alternative request the Secretary of the Interior and the Secretary of Agriculture to issue direction to all DOI agencies and the USFS requiring an analysis of how agency actions comply with the MMPA. It is important that federal policies do not conflict with the MMPA or create barriers to the environmentally responsible development of domestic mineral resources;

- The Federal Land Policy and Management Act of 1976 (FLPMA) at 43 U.S.C. § 1701(a)(12) which mandates that:

  > the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970;

- The Domestic Minerals Program Extension Act of 1953, 50 U.S.C. §2181 is very relevant to our country's current vulnerability to access strategic and critical minerals, and the potential adverse impact of that vulnerability on national and homeland security. The Act states, in part:

  > It is hereby recognized that the continued dependence on overseas sources of supply for strategic or critical minerals and metals during periods of threatening

> world conflict or of political instability within those nations controlling the sources of supply of such materials gravely endangers the present and future economy and security of the United States. It is therefore declared to be the policy of the Congress that each department and agency of the Federal Government charged with responsibilities concerning the discovery, development, production, and acquisition of strategic or critical minerals and metals shall undertake to decrease further and to eliminate where possible the dependency of the United States on overseas sources of supply of each such material.

In order to ensure compliance with this law, the President should issue an Executive Order requiring federal agencies to demonstrate that their regulations, policies and decisions comply with this law; and

- The Presidential Executive Order 13211 to consider domestic energy supply, distribution, or use.

  CEQ regulations should ensure compliance with Executive Order 13211 in NEPA documents.

5. Agencies should be granted the authority to disregard public comments that attempt to change land management status in project-specific NEPA documents.

Project opponents are misusing the NEPA process as a surrogate land use management law to stop mining on public lands on a project-by-project basis. These anti-development activists seek an outcome inconsistent with current land-use plans that authorize multiple-use, including mineral development, and one that exceeds the agencies' authority to reject Plans of Operation. Congress has constitutional authority to determine where mining can occur on public lands.

NEPA public comment scoping notices should specify the range of decision options authorized by statute and land use plans, and establish that project-specific NEPA documents cannot be used to change existing law or to challenge previously authorized land use plans. Interest groups seeking to oppose natural resource development on public lands already have an opportunity to express their viewpoint in NEPA documents that agencies prepare for their land use plans. Agencies should thus be granted the authority to disregard public comments that attempt to change land management status in project-specific NEPA documents.

6. NEPA alternatives analysis needs to recognize the fixed location of mineral deposits and other natural resources due to geologic constraints.

The CEQ regulations that implement NEPA (40 C.F.R. Parts 1500 –1518) create specific problems for proposed mineral projects. The requirement at 40 CFR Part 1502 § 14 to analyze alternatives to the Proposed Action is not well suited for many mineral projects because geologic factors must dictate where mineral exploration and development occurs. "Only a very small portion of the Earth's continental crust (less than 0.01%) contains economically viable mineral deposits. Thus, mines can only be located in those few places where economically viable deposits were formed and discovered." NRC Report at 2-3.

Unlike some commercial development projects where it makes sense to perform a site selection study to identify the optimal location for a proposed project, miners do not have the ability to choose where they mine. As indicated above, they have to explore and mine at the exact locations where mineral resources are found. Unfortunately, satisfying the alternatives analysis requirement is often a time-consuming paper exercise that adds unnecessary length and complexity to NEPA documents without adding much value to the environmental analysis.

Once a mineral deposit is discovered, there may be some flexibility in locating the mineral processing and ancillary facilities at some projects depending upon site-specific factors such as topography and land ownership patterns. In these situations, analyzing alternative locations for discrete project components may be a meaningful exercise. However, for many mineral projects, the range of alternatives that is practical, technically and economically feasible, and environmentally beneficial is extremely limited.

It should be noted that the FLPMA mandate to prevent unnecessary or undue degradation from mineral activities functions as a requirement to analyze and select alternatives for project components that would reduce environmental impacts. In order to satisfy this mandate, mineral project proponents must prove that the proposed project facilities and mining and reclamation techniques will not create unnecessary or undue environmental impacts. This burden of proof necessarily considers different project layouts and other mining methods to determine whether there are technically achievable and economically feasible alternatives that would reduce impacts. The FLPMA unnecessary or undue degradation mandate requires that exploration and mining projects use feasible alternatives that minimize environmental impacts.

NWMA recommends modifications to the NEPA alternatives analysis requirement that recognize the fixed location of mineral deposits and other natural resources due to geologic constraints.

7. Use of programmatic NEPA documents saves time and resources.

Federal land management agencies currently devote enormous time and energy preparing individual NEPA documents, typically Environmental Assessments (EAs), for exploration drilling projects. A more efficient and cost effective approach would be to prepare a programmatic document that analyzes the environmental impacts and appropriate mitigation measures for a typical exploration drilling project that employs a predetermined set of Best Management Practices. This document could then be used as the basis for evaluating individual exploration drilling project proposals.

Projects that fit within the parameters of the programmatic document and that adopt the recommended Best Management Practices and mitigation measures recommended in the programmatic document could then be approved with either a Categorical Exclusion or a Determination of NEPA Adequacy (DNA) checklist.

A typical exploration drilling program involves a limited range of activities that result in easily predictable and well understood environmental impacts. Constructing temporary access roads and drill pads disturbs soils and vegetation on a temporary basis. The mining industry has a demonstrated track record of successfully reclaiming this disturbance. Moreover, the outcome of the NEPA analysis for a typical proposed exploration project is predictable. Assuming the

project is located on lands open to operation of the Mining Law, and the project complies with the FLPMA mandate to prevent unnecessary or undue degradation, the agencies approve the project. Their approval may include special stipulations or required mitigation measures as necessary to address site-specific conditions and to avoid any environmentally sensitive areas with cultural resources or sensitive habitat. However, as discussed above, the agencies do not have the authority to categorically reject a Plan of Operations.

Using a programmatic approach to approve routine, short-duration projects would not modify in any way the level of environmental protection or reclamation applied to these projects. Operators would still have to collect site-specific baseline data to determine whether cultural resources or sensitive species or habitats exist in the project area, and if so, how to apply the Best Management Practices to mitigate impacts to these resources. It would, however, get to a decision point much sooner, with obvious benefits to the private sector and the Nation's supply of energy and mineral resources. It would also substantially benefit the quality of BLM's and USFS' land management activities because it would allow the agencies to spend more of their time on more complex and important decisions and less time preparing *pro forma* NEPA documents on routine matters. Moreover, a programmatic approach is consistent with 40 C.F.R. Part 1500 § 4(i) that directs agencies to use "program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§1502.4 and 1502.20)."

The current NEPA process consumes agency resources and private-sector capital that would be better spent on projects with tangible environmental benefits. CEQ should evaluate ways to re-direct the public and private-sector resources that are currently being spent on the NEPA process to on-the-ground environmental improvement projects. Instead of having to prepare lengthy and complex NEPA documents, there should be provisions added to NEPA that encourage direct investment in projects to enhance and improve our environment.

8. Implement the reform recommendations of the National Mining Association's white paper entitled *The National Environmental Policy Act Impact on Public Lands Mineral Development and Options for Reform.*

This report was prepared by NWMA member David Delcour for the National Mining Association and is based on interviews with 20 mining industry employees who have extensive experience with NEPA, 6 public land managers who had recent experience with mining projects subject to NEPA and 4 representatives of two other public land user groups, timber and oil and gas. Although this report was prepared in 1997, its findings and recommendations are equally valid today. If anything, the problems cited in this report have increased, permitting times are longer and frustration with the NEPA process is at an all time high.

This report is attached to these comments and incorporated by reference.

9. Implement the findings and recommendations of the National Academy of Science contained in its 1999 report to Congress entitled *Hardrock Mining on Federal Lands.*

In 1998, Congress authorized and mandated the National Academy of Sciences to identify and consider, among other things, recommendations and conclusions regarding how federal and state environmental, reclamation and permitting requirements and programs can be coordinated to

ensure environmental protection, increase efficiency, avoid duplication and delay, and identify the most cost-effective manner for implementation.

Several of those recommendations focused specifically on improving the NEPA process and streamlining the U.S. permitting system. Those recommendations are incorporated herein by reference.

10. Prevent redundant or duplicative NEPA analysis.

One of the many problems with NEPA is redundant or duplicative analysis. One way to address this problem is to provide that agency permitting processes that are the "functional equivalent" of a NEPA analysis satisfies the requirements of the law. The environmental performance and reclamation standards embedded in the Federal Land Management and Policy Act, the Forest Service Organic Act, and their corresponding regulations, supplemented by additional permit requirements under the Clean Air Act (CAA), Clean Water Act (CWA), Endangered Species Act, and Safe Drinking Water Act, provide the functional equivalent of a NEPA review for proposed exploration and mining operations on federal land. Altogether, these laws ensure the full and thorough consideration, both substantively and procedurally, of environmental impacts from mining operations on federal lands regardless of the NEPA process.

A functional equivalence exception would allow these agencies to more efficiently and effectively focus resources on the development of our nation's natural resources, while still preventing and minimizing environmental impacts as originally intended under NEPA. Congress enacted NEPA as a planning tool for federal agencies, mandating that agencies consider the environmental impacts of their actions. This purpose is now served by the environmental permitting processes currently applied by federal agencies to mining projects under other statutory schemes.

There is precedent to support this recommendation. Congress has exempted the Environmental Protection Agency from completing a NEPA review for certain permitting decisions under the CWA and CAA for this very reason.

11. CEQ should prepare regulations that allow existing state environmental review process to satisfy NEPA requirements.

NWMA supports the "functional equivalents" concept. If a state has a state environmental policy act or an environmental review/permitting process similar to NEPA, then NEPA regulations should allow that process to satisfy similar NEPA requirements. This will result in a more efficient, streamlined less costly process. In many cases today, state and federal agencies enter into Memorandums of Understanding (MOU) to allow one agency to be the lead agency. NWMA supports codification to bring consistency and cost effectiveness to the process.

12. Define "major federal action."

At the current time there is a significant difference of opinion between the various federal agencies and, in fact, between different offices within the same agency, as to what constitutes a major federal action. Some confuse "major federal action" with "major federal impacts" or major impacts to the environment. The size of the impact is not determinative as to what constitutes a

"major federal action." By establishing clear and concise criteria for what constitutes a major federal action, the process of evaluating environmental impacts and developing mitigation criteria will be improved and streamlined.

We believe "major federal action" should be defined to include only new and continuing projects that would require substantial planning, time, resources, or expenditures. Adoption of this recommendation will also serve to clarify the intent and application of NEPA in the eyes of the public.

13. Add Mandatory Timelines for the Completion of NEPA Documents.

NWMA strongly recommends mandatory timeframes of 18 months for completion of an EIS and 9 months for completion of an EA. Also, a specific time limit of no more than 60 days for completing the Categorical Exclusion process should be included. Allowances for one extension of those timeframes, of no more than 6 months for an EIS and 3 months for an EA, could be considered but only under the most unusual of circumstances. These timeframes should begin when the applicant has given the agency sufficient information to complete the NEPA process. If governmental agencies fail to comply with these statutory timeframes, then the NEPA review process should be deemed completed with an affirmative Record of Decision.

Other mineral producing countries (e.g. Chile) have firm timelines in their environmental assessment and permitting process. Our members have discovered that firm timelines in the permitting process facilitate raising the capital required for mineral development and lower the cost of capital without diminishing environmental performance. Indeed, the lack of a firm timeline for completing the permitting process has lead to negative market impacts on some of our member companies.

14. Allow applicant to prepare Environmental Impact Statements.

Applicants should be allowed to prepare EIS's, subject to independent review by the agency. This is currently the case with Environmental Assessments.

15. EPA's role in the NEPA process needs to be re-evaluated and even eliminated - especially in states with Clean Water Act and Clean Air Act primacy.

The U.S. Environmental Protection Agency (EPA) reviews NEPA documents prepared by other federal agencies under the authority of Section 309 of the Clean Air Act. The need for EPA to have a role in the NEPA process should be examined, especially in states with primacy for the Clean Air Act and Clean Water Act. In primacy states, EPA's NEPA review role should be eliminated or substantially revised because it is redundant and does not add any additional measure of environmental protection.

EPA's comments on NEPA documents often focus on many aspects of projects that are provided for under state water and air protection programs and other specific permitting processes applicable to the project. These comments from EPA would be more appropriate under the detailed permitting processes. Additionally, EPA should defer to the states as the experts on how the regulatory programs work in their states.

Clean Air Act and Clean Water Act permitting programs, as administered by states with primacy for these regulatory programs, ensure compliance with all applicable federal and state requirements. EPA's oversight role in monitoring these permit programs provides sufficient federal regulatory review and control. Moreover, it is not EPA's role to ensure compliance with NEPA. That is the responsibility of the lead federal agency charged with preparing the NEPA document.

All too often, EPA's comments on NEPA documents are not constructive. They are typically very critical of agencies' efforts. Regrettably, EPA's comments have a "gotcha" tenor, taking potshots at the federal agencies' documents.

Responding to negative and problematic comments from EPA creates serious problems for federal agencies, often resulting in significant delays in the NEPA process. EPA's comments often are received late or request additional or extended review periods at the 11th hour, which only serves to delay the process further.

EPA's NEPA comments also have the potential to create considerable public confusion about the environmental impacts associated with and the regulatory requirements for a project. In doing so, EPA arms project opponents with ample ammunition with which to challenge projects.

Part of the problem with EPA NEPA reviews may stem from the fact that the agency has a NEPA review branch that is separate from the EPA departments charged with issuing or reviewing project permits. For example, EPA's comments on a draft NEPA document may be very critical about the lack of detailed information about how projects involving a discharge to surface water will meet water quality requirements. These comments reflect a lack of understanding of NEPA's purpose as a disclosure document. Instead, these comments seem to incorrectly treat NEPA as a permitting process.

Additionally, these comments are typically offered in a vacuum, as if the discharge were not governed by a thorough and stringent regulatory program, (e.g., the National Pollutant Discharge Elimination System permit program.). Rather than adding anything of value to the environmental analysis, these types of comments are problematic and misleading. They create public doubt about whether there are adequate protections for air quality and water quality for projects, even though these projects must obtain Clean Air Act and Clean Water Act permits.

In some cases, EPA appears to be offering these types of comments in an attempt to expand its regulatory authority over projects, having lost sight of the fact that NEPA is a disclosure and decision-making process and not a permitting process. Because NEPA is not a permitting process, EPA should not be allowed to use it as such.

In other cases, it seems as if EPA is simply trying to obstruct projects. Regardless of whether the agency is seeking to expand its authority or to obstruct projects, both objectives are unacceptable.

NEPA should be amended or new administrative policies developed to preclude EPA from submitting comments that attempt to regulate through NEPA or that contribute confusion, with the apparent purpose of fomenting public opposition. Such comments hurt communities that need the jobs that proposed projects represent. EPA's obstructionist role in the NEPA process is

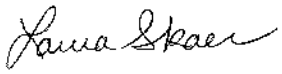
bad for the economy on the local, state, and federal levels. Additionally, EPA's role in reviewing NEPA documents is a waste of taxpayer money, especially in states with primacy for administering the federal Clean Air and Clean Water Acts.

CONCLUSION

Before long-term investments of hundreds of millions of dollars are going to be directed toward the U.S. mining industry, investors must see an efficient and predictable permitting system. The recommendations outlined in these comments, if implemented, will be a major step toward improving the competitiveness of America's mining industry.

NWMA appreciates the opportunity to provide these comments. We are more than willing to assist CEQ in its efforts to update and improve the NEPA process. If we or our members can be of assistance in providing more information, we would welcome the opportunity.

Sincerely,



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